No. 3703

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Plaintiff in Error.

vs.

JOHN T. LITTLEJOHN,

Defendant in Error

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court in the District of Arizona.

FAVOUR & BAKER, of Prescott, Arizona,
Attorneys for Plaintiff in Error.

Filed this.....day of....., 1921.

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Clerk U. S. Circuit Court of Appeals.

Service of copy of within Brief is acknowledged this.....25th.....day of August, 1921.

.....

Attorneys for Defendant in Error.

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Note: The Transcript of Record will be referred to herein as "Tr.," giving page number; and Plaintiff in Error will be referred to as "Defendant," and the Defendant in Error as "Plaintiff."

STATEMENT OF CASE.

John T. Littlejohn filed action August 10, 1920, to recover damages for injuries alleged to have been received June 2, 1920, while he was employed by the defendant. He alleged in his complaint that he was employed as a laborer in the bull gang and worked "in and about the smelter," ore reduction works and other buildings, at work consisting of pick and shovel labor and the like; that on June 2nd he was directed by the foreman of the gang to assist in installing certain equipment in the sample mill of defendant company and was ordered to take a large iron bolt to be placed in the framework of

or for certain rolls, to do which he was to cross a platform covering a concrete aisle or pit which was a part of the construction and was about 10 feet deep; that while he had said bolt partly raised ready to place, the plank upon which he stepped broke and he fell with the bolt to the bottom; that he was hit by the bolt as he fell, his skull and head were bruised and injured and he was rendered unconscious and received a severe concussion of the brain, spinal column and shock to his nervous system, said injury being permanent, and suffered great pain and anguish; that he suffered general damages of $10,000 and because of his inability to work, except for 17 days, had sustained special damages of $4.60 per day until the trial. He prayed for two items of damage to wit for general damages in the sum of $10,000 and for additional special damages for time lost to date of trial at $4.60 per day.

The defendant moved to strike certain allegations and also the allegations and prayer for special damages, as an additional sum and separate issue, which latter portion of said motion was overruled. Demurrers were interposed by defendant to the sufficiency of the complaint, both for a general cause of action and for special damages as alleged and pleaded, and these demurrers were overruled. The said rulings were made without oral argument or hearing, in accordance with the practice frequently followed by the Court, and defendant was advised of the rulings by mail, and excepted thereto a few days later when the Court opened its session at Prescott. An answer was also filed by defendant, and the case was tried by jury November 26 and 27, 1920.

The evidence showed that plaintiff had been employed for some time in the bull gang which performed general labor, much of the time of a non-hazardous kind, around the grounds and buildings including an office building, all of which plaintiff termed the "smelter plant." (Tr. 36.) For a few days prior to June 2nd he had been leveling up gravel around the general office there; on June 2nd five of the men were taken by the foreman over to the sample mill; there was at the end of the mill, on the outside (Tr. 60), some concrete construction work; the men were working on the construction work, which had not been completed or placed in use as a part of the mill (Tr. 44), and on this day were putting in bolts in some framework. The concrete formed in part an aisle or pit about 10 feet in all dimensions. Three planks 12 in. by 2 in. were across this aisle (Tr. 37). In order to put in these bolts the men went over on these planks. Two of the men were standing, wholly or partially, on one of the planks, each with a bolt, when the plaintiff with another bolt stepped on the plank and it broke (Tr. 44 and 60). He fell to the bottom and by his fall was cut on his left forehead and received other scratches and bruises (Tr. 37 and 61). He was taken to the defendant's hospital where his injuries were dressed. He went home and returned to the hospital for treatment each day for 14 days and on June 15th went back to work and according to his testimony was given "light work as near as the boss could" (Tr. 38). He worked 17 days and was "laid off." He did not work for wages from then to the time of trial (Tr. 43). He stated he could not get light work "around there" (Tr. 42).

At the trial in November the plaintiff introduced testimony of a physician who had examined him for the purpose of giving testimony (Tr. 45). The plaintiff, by his counsel, refused to be examined by disinterested physicians to determine his condition due to the injury as he alleged (Tr. 43 and 57). Plaintiff, while a witness on his own behalf on direct examination, volunteered statements with reference to negotiations he had with the defendant company respecting settlement and also that the defendant company was insured against loss and damage to any of its men growing out of injury, which statements are highly prejudicial and grounds for mistrial (Tr. 49). Defendant interrupted witness, objected and moved to strike and requested the Court to declare a mistrial, and was overruled by the Court, exceptions being allowed. Later in the trial the Court ordered the testimony struck out (Tr. 49) thereby reversing its ruling to that extent but not correcting and eradicating the error. Other matters to which objection and exception was taken occurred in the course of the trial, instructions and argument, and are set out in the Specifications of Error.

The jury returned a verdict for plaintiff for $8,000 (Tr. 17). Defendant moved that the verdict be set aside, in arrest of judgment, and for a new trial. Memoranda of authorities were submitted by both parties, no oral arguments were made, and on April 4, 1921, the Court overruled all of said motions, to which rulings defendant's exceptions were allowed (Tr. 31).

Thereupon, in due course, the defendant brought this cause up for review upon Writ of Error.

SPECIFICATIONS OF ERROR.

(These Specifications are arranged in chronological order of the Errors assigned. In the Arguments appearing after these Specifications, each Argument covers one subject, as near as possible, and the one or several Specifications concerning that subject.)

I.

The Court erred in overruling (to which exception was taken, Tr. 14) defendant's motion to strike the following clause in paragraph V of plaintiff's complaint "That he has sustained special damages for loss of time by reason of said injuries in the sum of Four and 60-100 ($4.60) Dollars per day from June 2, 1920, until the trial of this cause, less said period of seventeen (17) days aforesaid" and in paragraph VI "that by reason of loss of time and loss of wages as alleged aforesaid plaintiff has suffered special damages in the sum of Four and 60-100 ($4.60) Dollars per day from June 2, 1920, until the trial of this cause less a period of seventeen (17) days" and paragraph 2 in the prayer of said complaint "For the sum of $4.60 per day from June 2, 1920, until the trial of this cause (less a period of seventeen days), for special damages for loss of time occasioned by reason of said personal injuries sustained."; for the reason that loss of time is, under the Employer's Liability Law of Arizona, an item and element of general damages and is not a separate issue. (Assignments I and II, Tr. 100.)

II.

The Court erred in overruling (to which excep-

tion was taken, Tr. 14) defendant's demurrers to plaintiff's compaint, for the reasons that

(1) The facts set forth show that plaintiff was not employed in a hazardous occupation at the time of the accident, as defined and contemplated by the said Employer's Liability Law.

(2) No facts are stated constituting a cause for special damages on account of loss of time or any other item of special damage.

(Assignments III and IV, Tr. 100.)

III.

The Court erred in overruling (to which exception was taken, Tr. 41) the objection of defendant to, and defendant's motion to strike, the testimony of the plaintiff given upon an offer and in response to a permission of the Court (Tr. 39 to 41), in which testimony the plaintiff stated that he had been told by a former claim agent of defendant, then deceased, in course of negotiations for settlement that "They (defendant company) have them all (employees) insured and just as soon as ever those pictures are developed I will go down and try to settle up with you....," for the reason that the said testimony in relation to negotiations and alleged insurance was incompetent, inadmissible and prejudicial, and said ruling was prejudicial, to defendant and reversible error. (Assignments V, Tr. 101.)

IV.

The Court erred in sustaining the objection of plaintiff (to which ruling exception was taken, Tr. 43) to the request of defendant moving that the

Court order such physical examination of plaintiff as might be found necessary by physicians, to be appointed by the Court, to elucidate the matter in dispute (Tr. 43 and 59), for the reason that plaintiff had exhibited his head and physical condition alleged to be attributable to head injury, in evidence, and for the reason that the Court sustained the said objection of plaintiff upon the ground that the Court had no power to order said necessary examination (Tr. 43 and 59), and said ruling was not based upon any exercise of discretion of said Court to grant or to deny said motion. (Assignment VI, Tr. 101.)

V.

The Court erred in overruling (to which exception was taken, Tr. 44) the motion of defendant that a mistrial be declared because of the testimony of the plaintiff concerning negotiations and alleged insurance, as set forth in Specification III above, for the reason that said testimony so given, and the ruling of the Court denying defendants motion to strike it, were prejudicial to the defendant and prejudicial error that could be corrected only by a declaration of a mistrial by the Court. (Assignment VII, Tr. 101.)

VI.

The Court erred in overruling (to which exception was taken, Tr. 57) defendant's objection to the introduction and reception as evidence of American Mortality Tables by plaintiff, for the reasons:

(1) Plaintiff had failed to bring himself within the class of persons upon whom the mortality tables are based.

(2) Plaintiff had failed to introduce evidence and there was no evidence of permanent injury or incapacity, or impaired earning capacity in the future, either partial or total. (Assignment X, Tr. 102.)

VII.

The Court erred in overruling (to which exception was taken, Tr. 75) defendant's motion, made orally and in writing, after both plaintiff and defendant had rested, to direct the jury to return its verdict in favor of the defendant, for the several reasons stated in said motion (Tr. 73 to 75) and the following:

(1) There is no evidence to sustain a verdict for plaintiff, and the verdict is not supported by the evidence, and is contrary to law.

(2) There is no evidence that plaintiff was engaged in a hazardous occupation.

(3) There is no evidence that the accident was due to a condition of the employment or was not caused by negligence of plaintiff.

(4) The evidence shows that the accident was avoidable, and not caused by any condition inherent in a hazardous occupation.

(5) There is no evidence to support the allegation of plaintiff that he was working in the sample mill or in any other building or place used as smelter or ore reduction works where his occupation was hazardous as defined and contemplated by the Employer's Liability Law.

(Assignment XI, Tr. 103.)

VIII.

The Court erred in overruling (to which exception was taken, Tr. 76) the objection of defendant to argument of plaintiff's counsel to the jury (Tr. 76) "Now, we have asked for ten thousand dollars. You, gentlemen, know that ten thousand dollars today is not worth as much as five thousand dollars was four or five years ago," and in ruling (to which exception was taken, Tr. 76) "I sustain the objection in so far as it contains a statement of the fact by counsel, because it is not proper to state the fact, but I will permit counsel to argue and to ask the jury to determine whether the purchasing power of a dollar today is less than formerly. They may bring to bear their own knowledge and experience in order to determine that. In other words, I think it is the proper matter for them to consider in case they come to the conclusion that the plaintiff is entitled to recover in this action." for the reasons

(1) There were no facts in evidence and no verdict or other basis upon which the jury could make any comparison of values.

(2) The jury were permitted to pass upon matters not in evidence.

(3) The ruling permitted the jury to enhance damages, prejudicial to defendant, without any basis in evidence and upon purely conjecture and guess.

(Assignment XII, Tr. 103.)

IX.

The Court erred in instructing the jury (to which

instruction exception was taken, Tr. 93) as follows:

> "I charge you, as a matter of law, gentlemen, that all work in and about mines, ore reduction works and smelters is a hazardous occupation within the meaning of the law. Therefore, if you believe from a preponderance of the evidence that the plaintiff at the time he claims to have been injured, was working in and about open pits, open cuts, mines, ore reduction works, or smelters, he was at the time engaged in a hazardous occupation and that it comes within the meaning of the Employer's Liability Law." (Tr. 78.)

X.

The Court erred in instructing the jury (to which instruction exception was taken, Tr. 93) as follows:

> "And I further charge you that if he was, at the time, engaged in work in or about open pits, open cuts, mines,—(addressing counsel) I don't believe you claim under 'open pits or open cuts' in your complaint and it is merely that you claim that the work was done in connection with ore reduction works and mining, so I will modify it. I was simply reading it because it was all in one paragraph, not that I think the word 'quarries' has anything to do with this case, (addressing the jury) but that all work in and about mines, ore reduction works and smelters, if he was so engaged in that work, he was engaged in a hazardous occupation within the meaning of the law referred to." (Tr. 80.)

XI.

The Court erred in instructing the jury, (to

which instruction exception was taken, Tr. 94) as follows:

> "You are made the judges as to the extent of the injuries, if any, so sustained. It is not for the Court, it is for you to determine that question of fact, that is as to whether or not they are temporary or permanent, in character, and as to what extent, if any, by reason of such injuries only, plaintiff has suffered mental and physical pain and anguish or both, and also as to what extent, if at all, he has been by reason of such injuries disabled, and incapacitated from following his usual or any gainful, profitable occupation, and as to whether or not such incapacitation, if any, is permanent or merely temporary."
>
> Now, in the ascertainment of damages we pass now from the question of whether or not he was injured and whether or not injury or injuries were permanent and if you find that he was injured, then you must determine, as I said before, the extent of the injuries, and whether they are temporary or permanent, and after you have determined that question, then—and if you do determine that he is entitled to such damages by reason of such injuries, then you proceed to ascertain and determine the amount of damages that should be awarded him." (Tr.84.)

XII.

The Court erred in refusing to give the following instruction requested by defendant (to which ruling exception was taken, Tr. 93):

> "There is no evidence in this case proving the alleged injury was of a permanent char-

acter, and the alleged injury must not be considered permanent by you in the consideration of the case." (Tr. 95.)

XIII.

The Court erred in refusing to give the following instruction requested by defendant (to which ruling exception was taken, Tr. 93):

"The defendant is not responsible in damages to plaintiff because the plaintiff could not get or did not get work after he left defendant's employ, or because plaintiff did not get work which he considered he could do. The fact, if such it is found by you to be, that the plaintiff could not or did not get work should be disregarded by you in any consideration of damages, if any, on account of loss of time between the date of the injury and the date of trial." (Tr. 95.)

XIV.

The Court erred in refusing to give the following instruction requested by defendant (to which ruling exception was taken, Tr. 93):

"I charge you that under the allegations of the 4th paragraph of plaintiff's complaint the plaintiff could recover, if at all, only upon competent evidence that the work and occupation in which he was engaged at the time of the happening of the accident was in that occupation defined under paragraph 5 of Sec. 3156, R. S. A. 1913, which is as follows:

'All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in which the erection, construction, repair, painting or alteration of any building, bridge, structure or

other work in which the same are used.' '' (Tr. 96.)

XV.

The Court erred in overruling (to which exception was taken (Tr. 31) the motion of defendant that the verdict be set aside as uncertain and not responsive for the reason that the complaint and prayers thereof stated two issues, one for special damage and one for general damage.

ARGUMENT I.

Specifications of Errors I, XIII and XV—Special Damages.

(Matters concerning Special Damages as brought out by the Demurrer and Motion for Directed Verdict will also be considered hereunder.)

Under the practice in Arizona, loss of time has apparently been considered an element to be proved under general damage in actions based upon the Employer's Liability Law, and not as an item of special damages the facts of which must be specially pleaded. Unquestionably a damage which is in fact special must be specially pleaded; if, therefore, loss of time is held to be a special damage then the Arizona practice has been incorrect. The motion of the defendant to strike the attempted allegation of loss of time as special damage was made because of the said practice and because the said allegations in this complaint are not special pleading, in the customary way, of facts showing special damage, but they are attempted pleading of a sep-

arate and distinct issue for special damages in an indefinite sum based upon a sliding scale.

Arizona Eastern R. R. Co. v. Bryan, 18 Ariz. 106:

At page 118, the Court approves an instruction on damages, which includes the element of loss of time.

Arizona Copper Co. v. Burciaga, 20 Arizona 85:

At page 94 the Court includes in the elements of damage recoverable under the Employer's Liability "the reasonable value of working time lost."

Furthermore, the rule stated in Warner v. Bacon, (Mass.), 69 Am. Dec. page 259, is "But, as special damage—cannot be recovered unless it is alleged in the declaration, it follows that such damage, sustained after an action has been brought, cannot be recovered at all, unless in a new action, inasmuch as it cannot be alleged and proved before it exists." In the case at bar loss of time was alleged "to date of trial" as a special damage. If it is a special damage then under this rule it can include to date of action only.

Demurrer to Special Damage Allegations.

The complaint did not state any facts constituting a cause of action for special damage on account of loss of time. At the trial it developed that plaintiff had not been able to get, in his locality, the light work that he considered he could do (Tr. 42). There might have been other facts of another nature as to why time was lost, if any. The defendant was entitled to be apprised of the facts if a special damage was claimed. An examination of

the complaint shows hat there are no more facts in relation to special damage for lost time than are customarily pleaded for that or any other element of general damage, such as pain and loss of earning capacity. If loss of time is a special damage, then no facts to support such a special damage are pleaded and the demurrer should have been sustained and no recovery for the special damages.

City of Pueblo v. Griffin (Colo.) 15 Pac. 616:

The complaint pleaded "an expense of $50 for medical services with loss of time in his business." The Court states "The complaint is one for general damages only." "The distinction between general and special damages....is well understood.....The object of pleading being to apprise the opposite party of the nature of the claim against him as well as its extent, it is uniformly held that—if from any peculiarity in the circumstances or situation of the injured party other loss accrued to him thereby, such peculiarity must be alleged and proven." The Court held that no evidence of loss of time should have been admitted.

17 C. J. p. 1014 Note 60 (a):

A complaint alleging that plaintiff since the injury has been unable to do ordinary farm work and that he had been damaged in a certain sum was insufficient.

Motion for Directed Verdict, Affecting Special Damages.

The evidence concerning the loss of time was simply that plaintiff had worked for 17 days, then had

been discharged, that he had not worked to earn wages thereafter, that there was no work of the kind he considered he could do (Tr. 38, 42 and 43). This is manifestly no evidence whatever to support a claim for loss of time as a special damage. The law is stated in 17 Corpus Juris page 781, (quoted below), citing Kentucky and Alabama cases. It is submitted that the evidence in this case was such that admittedly there was ability to earn, if the plaintiff had secured the work he desired (Tr. 42, 43). There is no evidence that he could not have earned as much in the work he was able to do as he was earning in the work he was doing at the time of the injury. There is in fact no evidence of even impaired earning capacity during the period; the uncontradicted evidence shows there was no (Tr. 38, 42,43) inability to follow wage earning work, but admits the plaintiff could at least do light work. The motion for a directed verdict as it affected the issue of special damage should have been granted.

Specification of Error XIII.—Refusal of Instruction on Ability to Get Work.

The defendant requested the Court to give the instructions set out in Specification XIII because the plaintiff had testified that he had for seventeen days, between the date of the accident and the date of the trial, done the same kind of work as before the accident except that it was lighter work "as near as the boss could" (Tr. 38 and 43), and that after his discharge, "there was no light work that I could get around there." The defendant was in no way responsible for the alleged loss of time due

to inability of the plaintiff to get work. The defendant was under no legal or moral duty to give the plaintiff work, though the testimony concerning his discharge was manifestly intended by plaintiff to have the jury so consider (Tr. 38). The testimony about his inability to get work might possibly have been admissible in order to give the inference that the plaintiff was willing to work if he could get it. But certainly, the defendant was entitled to an instruction which would inform and instruct the jury that this inability to get work had nothing whatever to do with damages on account of the alleged loss of time and that the testimony should not be so considered. The law is clear upon that point. The instruction given by the Court (Tr. 84) was "you will also or may also make due and adequate allowance for the reasonable value of the time lost by the plaintiff as a result of such injury or injuries from the date they were so sustained to the present time." There was nothing in this instruction defining or explaining what should be included or excluded in "time lost." It permitted the jury to guess and speculate and in view of the evidence of the plaintiff concerning his inability to obtain work, the jury was free to consider and undoubtedly did consider that the said inability to obtain work was evidence and adequate evidence of time lost. The failure to give the instruction requested or some instruction defining, explaining and limiting the term "time lost" was prejudicial error and especially as there was no substantial evidence of any loss of time due to inability to perform work in a gainful occupation.

17 C. J. P. 781 Note 84, and P. 783:

"Loss of time as an element of damage means time that is totally lost, due to the fact that the injured party cannot follow any wage earning occupation, as when he is confined to his bed by an injury. It is more than the impairment of the power to earn money, as impairment implies that the injured person can perform some service or follow some wage earning occupation and that his ability to earn money although reduced is not totally destroyed."

"There can be no recovery for mere inability to find work after the injury as distinct from an inability occasioned by the plaintiff's incapacitation from labor because of the injury."

ARGUMENT II.

Specification of Error II.—Demurrers.

In paragraph II of the complaint, the defendant is alleged to have been conducting a smelter and appurtenances in "sampling" as well as "smelting" ore. The allegations recognize that sampling and a sampling mill is a distinct operation and mill from smelting and a smelter. The allegations in paragraph III show that plaintiff was not engaged in a "hazardous occupation in mining, smelting" or "in any other industry" (Sec. 3154 R. S. A. appendix, but that he was employed in a yard crew pendix), but that he was employed in a yard crew that was in general performing work which had no more connection with the "hazardous occupation i mining and smelting" than does the work of a gardener around the campus of a university which has among its buildings a shop or laboratory where power driven machinery is used. If the words

"works" and "plants" are to be interpreted in the Employer's Liability Law to mean and apply to all the buildings owned or controlled by an employer which are in proximity to, or on the same tract of land as, a building in which machinery is power driven, or in which a really hazardous industry is carried on, then it is submitted that if work everywhere around the grounds and buildings, where one building is a smelter, is regarded under the law as a hazardous occupation in smelting, it would logically follow that manual work in and about a university which had a building in which there was machinery driven by power would be a hazardous occupation. At least the "hazards" surrounding such manual work about the grounds would be the same in each case. We assume that such work about a university would not be declared to be work "in and about" a "plant," where mechanical power was used, although such an institution is spoken of as an educational plant. The words in the law should be confined to a reasonable intendment taking the law as a whole in its provisions and avowed object. This Court has decided in the case of New Cornelia Co. v. Espinosa (268 Fed. 742) that such a reasonable construction must be given and that the law does not mean, when it says "in and about mines," that all men employed by the owner are in a hazardous occupation simply because they happen to be about the surface of a mine and "within the lines" of the owner.

There are no facts in this complaint showing that the plaintiff was in a hazardous occupation "in and about" a smelter, giving the words and the term "smelter" a reasonable construction in view of the

whole law and following the reason and spirit of the New Cornelia case in its interpretation of the words "in and about mines;" there is no allegation showing that power was used, or was being used, to operate any machinery in the sample mill, even if plaintiff had been working in said mill, which the evidence showed he was not, or that machinery or power in any way was the cause of or was connected with the accident. It is clear from the facts alleged that the work being done by plaintiff and the place and manner of the accident was not in any sense due to a condition of employment in a hazardous occupation, as contemplated by the law. It was no more work in and about a smelter, or work in a plant where power driven machinery was being used, or affected by any smelting work or use of machinery, than as if the plaintiff had been putting bolts in concrete framework in similar construction work on the ground outside of and on an addition to one of the recitation buildings of a university. The facts show that the plaintiff was engaged in construction work pure and simple, (as facts as distinct from conclusions are alleged in the complaint), was not engaged and had not been engaged in a "**hazardous** occupation in smelting" or in such an occupation within a plant. In order to state a cause of action under the Employer's Liabilty Law, applicable to construction work, plaintiff would have to bring himself under Sec. 3156, subdivision 5 (Appendix and in Specification XIV supra); this he has not done, because the platform was admittedly less than 20 feet from the floor.

Because he was not engaged in a hazardous occupaton, and because the accident was not due to

a condition or conditions of employment in a hazardous occupation, as shown by the facts alleged in the complaint, the remedy if any which plaintiff had was under common law negligence as modified by Arizona law, one of the three avenues of redress open to an employee and declared in Consolidated Arizona v. Ujack, 15 Arizona. on page 384.

We submit that not only is our position on this point suported by a reasonable and fair construction of the statute, applying legal rules of construction, but this position is that of the Courts, and we have taken it accordingly, as shown in the decisions and reasoning of this Court in the New Cornelia case, and of the Arizona Supreme Court in the Matthews case.

Arizona Eastern R. R. v. Matthews, 180 Pac. 159; 20 Ariz. 282.

Conroy v. City of Clinton (Mass.) 33 N. E. 525.

Wilson v. Dorflinger & Sons, 218 N. Y. 85.

Guerrieri v. Industrial Com. (Wash.) 146 Pac. 608.

Wendt v. Industrial Com. (Wash.) 141 Pac. 311.

State v. Business Property Co. (Wash.) 152 Pac. 334.

Remsnider v. Union Savings (Wash.) 154 Pac. 135.

Edelweiss v. Industrial Com. 125 N. E. 260.

These cases indicate that the courts have construed clauses in the light of the object of the whole law and have limited the clauses to a reasonable construction instead of giving a possible but manifestly too wide a definition of terms:

In the **Wilson** case, New York, the Court held that an elevator was not under a clause defining as hazardous the "operation otherwise than on tracks on streets, highways or elsewhere, of cars, trucks, wagons or other vehicles...propelled by steam, gas, gasoline, electric, mechanical or other power."

Of the three Washington cases:

In the **Wendt** case a carpenter for a department store was killed in turning on an electric switch in a shop maintained for repair of vehicles used by the store and in connection with it. It was contended that the employer must be shown to be engaged in hazardous work in respect to his whole business. The law made work in a workshop hazardous. The Court held that if an employer conducted any department of business as hazardous, his employees therein would come within the law, even though the principal business was non-hazardous.

In the Guerrieri case the law defined "mill" as "any plant, premises, room or place where machinery is used." The Court held that "There was no purpose to cover the operation of an ordinary...elevator or recognize it as..hazardous..or inherently dangerous."

In the Remsnider case the defendant, owner of an office building, contended that the work of a janitor was hazardous where he

had gone into an elevator shaft to wash walls and was injured by elevator. Contention was based upon Wendt case. The Court states that its decision in that case was on the plain fact that the deceased met death in attempting to operate driven machinery in a workshop in connection with his regular employment; that the Act does not imply that every place in which power driven machinery is employed impresses a hazardous character on work performed in such places; that though the employment of plaintiff at times was hazardous, it was not one inherently and constantly hazardous.

In **Edelweiss v. Commisson** it was stated that an injury from a hazard to which the employee would have been equally exposed otherwise does not arise out of the employment; the causative danger must be peculiar to the work incident to the character of business.

This Court is familiar with the **Matthews** case, as shown by comments thereon in the New Cornelia decision. In that case the reasoning distinctly shows that an employee must show employment in a hazardous occupation **in** smelting, railroading and the like and the accident must be due to a condition or conditions of such hazardous occupation. It shows clearly that not all occupations in railroading are hazardous under the terms of the law. In passing, attention is invited to the statements on page 287 in reference to the word "plants" as it appears in the law. The Court recognizes that the term is necessarily to be defined. "If the freight depot and platform, in which was the opening that appellee fell into, was a **plant** "by which the railway business" of appellant was in part

operated...we submit, without so deciding, that his occupation might be one of those intended to be declared...hazardous." At page 288, in speaking of the occupations declared hazardous by the law, the Court states "Labor in any of the named occupations must mean actual physical contact with the dangerous instruments and means used in carrying on the business." At page 290, in interpreting Sec. 3155, the Court said: "It will be noted that stress in this definition is placed upon 'the means used and provided for doing the work in said occupation.' In fact, the dangerous 'nature and condition' of the occupation is not alone because of the work, but because of the lethal character of the means employed to do the work required of the employee. The nature and conditions of the occupation, and the means used and provided to do the work therein, are so dangerous and the risks therefrom are so inherent as that accident therefrom is 'unavoidable by the workmen therein.' It would seem that before an employee may recover for injury under this act, it must have occurred while he was at work in his occupation, and it must have been occasioned by a risk or danger inherent in the occupation. Our statute (para. 3158) requires something more than that the 'accident arise out of and in the course of the employment,' an expression common to most of the liability and compensation laws....Under our statute the work must be hazardous and the injury must have been incurred because of the hazard or danger in the work itself and, because of said hazard, 'unavoidable' on the part of the employee." And at page 291, quoting from New York cases, "Where....the employee's ordinary duties and accustomed

scope of activities do not come exclusively or predominantly within the category of enumerated employments, and only casually and incidentally does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing work named in the statute. If the employer shows that the employee was not so employed when he met with injury, he is not entitled to reimbursement under the statute, even though he at times did work embraced within the statute." The case at bar is precisely the kind of case described and contemplated in this last quotation. The evidence shows plaintiff was not doing work within the statute at the time of injury.

ARGUMENT III.

Specification of Error III and V.—Testimony Regarding Insurance.

In the course of the trial on the direct examination of the plaintiff by his counsel a question arose as to the admissibility of plaintiff's testmony respecting his ability to work. We quote from the record as follows (Tr. p. 38, 39, 40, 41):

PLAINTIFF'S ATTORNEY. "And why didn't you work longer?" A. "They laid me off."

DEFENDANT'S ATTORNEY. "We desire to enter an objection to that on the ground that it was one of the matters stricken from the complaint and it is not proper for counsel to refer to that. It i absolutely immaterial in this case."

PLAINTIFF'S ATTORNEY. "We have a right to show....."

COURT. "I don't know that it was by reason of his being physically incapacitated. I think it goes to that."

DEFENDANT'S ATTORNEY. "Unless he shows that point, I think the conclusion of the witness is not to be taken."

COURT. "He may state whether or not he was able to continue at work."

"I quit by request and got my time; I suppose because I wasn't able to do the work."

DEFENDANT'S ATTORNEY. "I move that that be stricken out."

THE COURT. "No, if he don't know positively, don't state an opinion, that may be stricken."

The WITNESS. "Well, I can tell what was said to me by the authorities if that will do any good."

The COURT. "Well, you may tell that."

The WITNESS. "The timekeeper—Mr. Wright told me that the timekeeper wanted to see me, s I goes to the office and went in and he said he had orders to lay me off till I felt able to sign the release. He says, 'I will give you this check and that will be all.' That was the check for my half month's work, for the fifteen days, and he give me that check and he says, 'That will be all.' Then I taken the matter up with the claim agent, Mr. Johnson. Well he first ignored me when I went (4) (37) up there and said 'I cannot do anything for you. Dr. Moore pronounced you all O. K.' I

said, 'I cannot help what Dr. Moore pronounced me, my head and neck hurts me worse now than it did at first.' He said, 'You go back to Dr. Moore and let him examine you, and unless he says you are all right you come back here again.' After he said he couldn't do anything for me he turned around and said that. Well, I goes back and seen Dr. Moore again. He examined me again. Mr. Moore said as far as he is concerned himself he pronounced me sound, and I went back home. The next pay-day after that Dr. Moore and Mr. Thompson, the claim agent, came out to my place, and Mr. Thompson suggested that I should go up to the Verde and be examined by that gentleman sitting right there—I have forgotten his name—regardless of Dr. Moore. I told him all right. He said he would take me up and back. I said, 'All right.' I wasn't contrary; I didn't want to be; I didn't care whether they were company's doctors; so I went up there. That doctor proposed that I should go to Jerome next day and have an X-ray picture taken, then he would make a thorough examination of me; so I went, according to that, and they taken the X-ray pictures, and I went in and they give me a thorough examination. Then Mr. Thompson walked over to me after the doctor got through examining me, and he said, 'Littlejohn,' he said, 'I don't want you to think that we ain't to do—that I ain't going to do fair with you. I have no other orders only to treat the men fair.' He says, 'Mr. Kingdon gives me orders to treat his men all fair. They have them all insured and just as soon as ever those pictures are developed I will go down and try to settle up with you, and I don't want you think'—

Mr. FAVOUR. "I object to this. We don't want to prolong ths trial. This is kind of a garrulous statement of gossip (5) (38) of what took place and has no bearing on the case. We don't want to keep objecting, but I do object to this long statement of matters that are highly prejudicial and have no bearing on the case, and I ask that the witness be questioned as to the issues involved here."

The COURT. "Any conversation with reference to settlement would not be admissible."

The WITNESS. "I just had one or two more words and I would have been through."

Mr. FAVOUR. "May I ask that that be stricken out, that statement?"

The COURT. "No, it wasn't objected to; it may stand."

Mr. FAVOUR. "Well, I ask particularly that the matters concerning that the company is insured, be stricken out."

The COURT. "No, I deny the motion."

Mr. FAVOUR. "Note an exception to that, please."

The COURT. "The reason for the denial is, that there was no objection to it until after it was all stated."

Mr. FAVOUR. "I couldn't object to that, it wasn't in response to any question. I don't know what is in this witness' mind. If he starts answering a question and rambles off and makes a statement prejudical to the defendant"—

The COURT. "Well, you heard him when he started to ramble and didn't make any objection."

Mr. FAVOR. "I ask now that it be stricken out."

The COURT. "Well, I deny the motion."

Immediately thereafter the defendant moved the Court to withdraw a juror and declare a mistrial on account of the improper, prejudicial statements as made by the plaintiff, which the Court overruled (Tr. 45). Later on in the trial and after other witnesses had been examined and testified for the plaintiff the Court on his own initiative ruled as follows (Tr. 49,50):

The Court. I find from an examination of the reporter's notes here that this witness, the plaintiff, made a statement to which counsel for defendant objected, in reply to a question or permission of the Court, and therefore, not having (12) (45) been asked for by counsel on either side and not being responsive to the subject he was discussing at the time he was given permission by the Court to proceed with his statement, I think there are certain portions of this that I shall strike out. He proceeded to tell what Mr. Thompson—well, first the wtness said, "I can tell what was said to me by the authorities if that would do any good," and the Court said, "You may tell that." I supposed he had reference to whether he—to the matter of hi being able to work, and he went ahead to say what Mr. Thompson told him and what the doctor told him and then he proceeded to make a statement which neither the Court nor counsel on either side would have anticipated, and therefore I exclude this portion of his testimony entirely, "Then Mr. Thompson walked over to me after the doctor got through examining me and said, 'Littlejohn, I don't want you to think that we ain't—that I ain't going

to do fair with you. I have no other orders only to treat the men fair.' He says, 'Mr. Kingdon gives me orders to treat the men all fair. They have them all insured and just as soon as ever those pictures are developed I will go down and try to settle up with you, and I don't want you to think' " —and then he was stopped. Now all that I exclude because in the first place any discussion by itself with the expectaton of the efforts to make a satisfactory and mutual arrangement for settlement is never admissible in the trial of a law suit. People have a right to settle their differences and to make their peace and to avoid litigation, and any statement made by either party while that is in progress is never admissible in a law suit and is no admission of fault or liability on the part of either, and the question as to whether these men were insured is wholly immaterial in this case. You can readily see why that (13) (46) might be so. In the first place, it might be a case where the insurance could never be collected, the insurance company might be insolvent or they might refuse to pay, many reasons why that is not admissible, and therefore plaintiff's statement which was not called for by counsel on either side, and I didn't anticipate it when I permitted him to make a statement with reference to his physical condition, therefore you will not consider it at all for any purpose. Make up your verdict wholly independent of that statement."

It is submitted that the ruling of the Court in admitting the evidence and the refusal to grant a mistrial and afterwards in striking testimony and then a statement to the jury in the manner and way done amounted to prejudicial error, could not help but

have its influence on the minds of the jury, and influence the verdict of the jury, and is reversible error.

There is no question, under the authorities, that testimony or statements in regard to such insurance should be kept from the jury where they are irrelevant to the case, as here. Even if it were the law, which we submit it is not, that mere striking of the testimony and an instruction to the jury to disregard, were sufficient to eradicate the error, the action of the Court in this case in emphatically overruling the objection of defendant made immediately, and in denying the motion of defendant that a mistrial be declared, were acts which too firmly impressed the minds of the jury with the prejudicial testimony and with the first determination of the Court that the testimony should be allowed to stand, for his belated ruling, granting only part, to eradicate. This statement of plaintiff was not a mere inconsequential matter, it was an error which under the cases, even a prompt and positive ruling by the Court without equivocation would not eradicate in view of the circumstances of its introduction and its prejudicial effect. The emphatic, and even persistent and abrupt, ruling (Tr. 41) permitting the testmony to stand, and the refusal to declare a mistrial, unquestionably emphasized this occurrence and testimony in the minds of the jury, and the action of the Court some time later in simply and routinely instructing the jury to disregard the testimony could not fail to leave the impression that this testimony had been ruled out on account of some doubtful point of law, because this testimony had been given in response to permission of

the Court and the objection had been made by the defendant and at first overruled. All the circumstances and the rulings of the Court, on account of the delay before the first ruling was finally changed, served to emphasize and impress the occurrences upon the jury, instead of tending in any way to eradicate or cure the error.

But the authorities, supported by reason and equity, show that where such information concerning alleged insurance is brought before the jury, the verdict must be reversed unless it is clear that the verdict could not have been influenced, and it should be reversed even though the lower court excluded the testimony and directed the jury to disregard it. In some of these cases, the fact that the injection of the testimony was due to questions asked on plaintiff's side is considered. If this were the controlling point, the case at bar would all the more require a reversal because the testimony was injected under an offer made by plaintiff personally, and under a permission given by the Court to plaintiff to make a statement, and the statement made after plaintiff's offer injected the prejudicial matters more decisively at the responsibility of plaintiff than if his counsel had asked a question. Ignorance of the law would not affect the result. But there was no inadvertence; the whole testimony of plaintiff Littlejohn shows that he was a shrewd and clever witness and that he was aware or had been made aware of the effect that this testimony about insurance might have, and that his offer to make a statement and his statement were deliberate and intentional (Tr. 41, "I just had one or two more words and I would have

been through") and in no sense can the evidence be said to show that the statement was inadvertently made. If the rule were that testimony of this kind is to be held as prejudicial only when brought out by counsel and not when offered and introduced by the plaintiff, a suggestion in advance to the plaintiff by his counsel would be sufficient to get the information in for its effect and without any peril of reversal. We submit that law and justice require a reversal upon the basis of this error alone.

Simpson v. Foundation Co., 201 N. Y. 479.

Iverson v. McDonnell (Wash.), 78 Pac. 202.

Lowsett v. Seattle Co. (Wash.), 80 Pac. 431.

Stratton v. Nichols (Wash.), 81 Pac. 831.

Birch v. Abercrombie (Wash.), 133 Pac. 1020.

Shay v. Horr (Wash.), 139 Pac. 604.

Cameron v. Pacific Lime Co. (Wash.), 144 Pac 446.

Dameron v. Ansboro (Wash.), 178 Pac. 874.

Union Pacific v. Field, 137 Fed. 18.

Waldron v. Waldron, 39 L. Ed. 452.

In the **Simpson** case the positive attitude of the New York Court, that the material point of error is the fact that testimony or statements are brought to the attention of the jury when they are irrelevant to the issue, and any contributory misconduct of the plaintiff is secondary. In that case a witness testified in response to question of plaintiff's

counsel that a certain person represented a liability insurance company. Counsel claimed it was unexpected. Defendant asked for mistrial but this was not acted upon and the Court allowed the evidence to stand. The appellate Court stated that the plaintiff's counsel should have moved to strike and have done all possible to counteract the testimony. At page 490, the Court states "Evidence that the defendant was insured . . . is incompetent and so dangerous as to require a reversal even when the Court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it would not have influenced the verdict." Judgment was reversed.

The **Iverson** case is the first of a line of seven decided in Washington, wherein the same rule of decision is adopted and the New York cases approved. This case gives the decision and reasoning which are reiterated in the latter cases. In this case the defendant was asked upon cross examination if he carried liability insurance; some of the questions were stated by the plaintiff's counsel to be for the purpose of testing credibility. The Court, at pages 203 and 204 cites Manigold v. Black, 89 N. Y. S. 861 as holding that the **asking** of such a question constituted reversible error where it did not affirmatively appear that it did not affect the verdict, though the Court instructed the jury that they should not regard it; that it is not proper to inform the jury of such fact in any manner.

The Court states further that in the case at bar it is true objection was sustained, but "it had to be done over objection of the defense the urging of which was practically an

admission of the fact;" also that "it is a fundamental principle that testimony should not be introduced which is not pertinent."

"But even in the absence of any authority, and if the question were presented to this Court for the first time as a matter of first impression, we should without hesitancy conclude that such practice was not in conformity with general principles of law, and hinders, rather than aids, the jury in arriving at a just verdict. For the error alleged in this respect the judgment will be reversed."

In the **Stratton** case the plaintiff's counsel asked jurymen if they were connected with any insurance company that insured against loss on account of negligence, and on cross examination of a witness asked if he was not attorney for the company which insured the mill. On objection he offered to prove the witness was such attorney. The objection was sustained. The Supreme Court held this occurrence constituted prejudicial error under authority of Iverson case.

In the **Birch** case, the Court at page 1024 states: "While the trial court instructed the jury to disregard testimony (about insurance) he refused the request to discharge the jury from consideration of the case. We think this error. In the nature of the case the striking of the evidence and the instructions to disregard it cannot cure the objectionable effect of the fact being brought to the attention of the jury."

In the **Shay** case, the lower Court instructed the jury that the admission of the evidence in relation to insurance had nothing to do with the case. The Supreme Court at page 605 states: "We have held in (these)

cases that it is improper to either directly or indirectly get before the jury any fact which conveys information that the defendant is insured against loss in case of a recovery against it, and that striking of the answers conveying such information and instructing of the jury not to consider it will not save the error. The authorities are united that error must follow these facts, unless it clearly appears that they could not have influenced the jury." And further "The parties to this action and their liabilities must be determined by the pleadings, and when other parties or other issues are injected, the one so injecting does so at the peril of any judgment he may obtain. The law is too well settled in this and other jurisdictions to permit of further argument." Judgment was reversed.

The ruling of the Court in striking did not cure the error:

In **Union Pacific v. Field,** the Court states that the presumption is that error produces prejudice. It is only when it appears so clearly as to be beyond doubt that the error challenged did not prejudice that the rule that error without prejudice is no ground for reversal is applicable.

In the **Waldron** case the U. S. Supreme Court states:

"Undoubtedly it is not only the right but the duty of a court to correct error arising from erroneous admission of evidence when the error is discovered, and as a rule when correction is so made the cause of reversal is removed, but the curative effect depends on whether error was of such serious nature that it must have affected the minds of the

jury in spite of the correction. In such cases the withdrawal does not remove the effect."

ARGUMENT IV.

Specification of Error IV.—Denial of Physical Examination.

The plaintiff alleges an injury to his head, sustained a few months before the trial. He testified to alleged effects of the injury to his body and other physical conditions. The plaintiff's counsel said to the jury (Tr. 37) "Feel this man's head, gentlemen." and the court said "If any of the jury desire to make a personal inspection you may do so." The defendant, because of this introduction into evidence requested of the Court an examination of the plaintiff's head and physical condition (Tr. 43). The plaintiff objected to an examination by disinterested physicians to be appointed by the Court. The Court sustained the objection and refused to order the examination requested, but restricted it to the head. The reason for this ruling by the Court was clearly shown to have been based upon the belief that the Court did not have the authority to order such an examination as might be necessary to elucidate the matter in dispute. The ruling was not an act based upon, and did not represent, an exercise of discretion on the part of the Court, since the Judge did not consider that he had the authority to exercise discretion (Tr. 57 to 59).

The defendant's point upon this specification is that the evidence shows that the plaintiff was endeavoring to recover damages for a physical condition due to alleged injuries to his head, that his

testimony related to the alleged effect of injuries to his head upon his body, nerves and physical condition, that by the offer of his counsel to the jury as shown above quoted he placed in evidence the condition he had testified to, not the mere externals of his head, and the defendant was therefore entitled to an examination to the extent that might be reasonably necessary to ascertain the injuries to his head and whatever condition might be found to be a result of the said injuries. There is no question that, in the absence of a statute requiring it or an offer of the head into evidence the Federal Court, under its rulings would have no power to order an examination if the plaintiff objected; although there is now a statute of Arizona authorizing examinations. The theory of the Court in refusing such examination was based upon the belief of the judge that he lacked the power to order it. We contend that he did have the power, in view of the offer into evidence, and that his ruling was in error because it was based upon a misapprehension of the power of the Court under the circumstances. The ruling was not based upon an exercise of discretion, as is plainly indicated by the statement of the judge (Tr. 57), "In the absence of an authority on the subject, I think I will be compelled on objection of the plaintiff to restrict the examination," and (Tr. 59), "Well, I haven't any authority to grant that permission. He is the only man that can, and he denies that authority through his counsel.'

Chicago & Northwestern R. R. v. Kendall 167 Fed. 62.

Denver vs. Roberts, 96 Pac. 186.

Holton v. Janes, N. M. 183 Pac. 395,
17 C. J. 1056.

In the **Kendall** case, (CCA 8th) the plaintiff voluntarily exhibited his knee in open court for examination by the jury. The Court at page 71 states that having done this "it is beyond his power to arrest the investigation." The defendant and the Court were entitled to "any agency in its examination which would aid in the determination of the issue on trial." "It is subject to any legitimate examination and test which will elucidate the matter in dispute."

In **Holton v. Janes** plaintiff was being questioned about a hole in his head and was asked "What part of your head, let the jury see it." Defendant asked for examination of parts exhibited. The Court denied, giving no reason. Plaintiff had also claimed injury to vision but had not exhibited the eye except as he exhibited his head. The Court on review at page 397 said: "It is a matter of common knowledge of which courts will take notice that the question of impairment of vision is capable of exact determination, and in this case when the plaintiff put his head in evidence and permitted the jury to examine it, unless the eye which he complained of as being injured was put out, the jury could in no manner determine the extent of the injury to it, if any, but with the aid of experts the matter was capable of exact determination. For the reasons stated the case is reversed."

In **Denver v. Roberts,** the Court holds that when the trial court has discretion, but denies on the ground it has not the power, this is error.

ARGUMENT V.

Specification of Error VI.—Admission of Mortality Tables

There is no evidence showing the applicability of the mortaltiy tables to the plaintiff. The Court recognized this, when in submitting the tables in evidence, the judge (Tr. 56) stated that he should charge that the injuries must be found to be permanent before the tables could be of any effect and "I should also state the class of persons of whom that table is made or from whom it is made and ask them to find in the first place whether or not he comes within that class and if so then they may consider the tables." But this instruction was not given, and the jury was not told that they should first determine whether the plaintiff belonged to the class indicated. There was no evidence whatever that he came within the class of which the tables are made up; and such evidence is required. On the contrary it was the contention of the plaintiff that he was in a hazardous occupation which is a totally different class.

Kerrigan v. Penn. R. R., 44 Atlantic 1069.

Rooney v. N. Y. N. H. & H., 53 N. E. 435.

City of Friend v. Ingersoll, 58 N. W. 281.

There is no evidence, even assuming the truth of all evidence, of permanent injury, which is a condition precedent to the admission of such tables (United Verde v. Koso, CCA 9th, not yet reported). It is not a question for the jury simply because the permanency of the injury is alleged; there must be

evidence, which, if credible, would warrant a finding of permanent injury to a reasonable certainty before this question can be submitted to the jury or before mortality tables are allowed to be introduced in evidence. The Court has the same province to determine whether there is substantial evidence, before admitting such tables, as it has to determine whether there is evidence sufficient to support a verdict when a motion for directed verdict is made. The lower Court in this case did not determine whether or not there was any evidence of permanent injury. The Court took the position that it had nothing whatever to do with that question but it would be for the jury to determine whether there was evidence. (Tr. 56 and 84). We submit, upon the authority of the cases cited that this position is erroneous, and that to permit the jury to pass upon the question of permanency where the evidence, even if its credibility is assumed, is not evidence to a reasonable certainty, is prejudicial error, and contrary to law and equity.

We further submit, that far from being any evidence to a reasonable certainty of permanent disability, the most that could be said about the testimony of the plaintiff's physician was that he "could not say." If such testimony, its truth being granted for this argument, can be regarded as evidence of permanence, then we fail to see where there is any distinction between temporary and permanent injury, and it would appear that all that is necessary for the plaintiff to recover for permanent injury is to refuse an impartial examination and then have testimony introduced that his condition is doubtful with respect to whether or not

it will clear up, a statement impossible of refutation in any case. The plaintiff's physican in this case said nothing whatever about permanent injury on his direct examination. Upon cross examination in answer to a direct inquiry he testified (Tr. 45 and 46) that the general tremor was only a symptom and "I think it will continue in a man of his age," later qualifying this testimony (Tr. 47): Q. "Won't that clear up?" A. "I cannot tell." Q. "Wouldn't you say in your opinion it will clear up?" A. "I wouldn't say at his age, that tremor."

The only testimony in regard to the question of permanent disability was that of Dr. Moore, defendant's witness, who had treated the plaintiff (Tr. 63). "I do not believe there will be any permanent disability resulting from his injury," and of Dr. Southworth, defendant's witness (Tr. 71), "Knowing what I do, I would say that certain temporary physical conditions have resulted from Mr. Littlejohn's injury."

The injury to the plaintiff had occurred only a few months before the trial and his own testimony and that of his physician showed that even the external wound or cut had hardly time to heal (Tr. 44). Naturally the other effects from the wound would not then have had time to clear up and a physician could easily be doubtful as to what might be the ultimate result. But such doubt, shown by the physician's testimony (Tr. 47), in this case. "I cannot tell, I wouldn't say at his age" is not that evidence to a reasonable certainty which is the rule of what is necessary in order to support a case of damages for permanent injury. To allow a

jury to pass upon the question whether or not there is permanent injury in such a case where there is no substantial evidence and the physician's opinion is speculative, uncertain and manifestly no opinion whatever as to permanency, is clearly allowing the jury to speculate and guess upon speculative and uncertain testimony of the physician. And the plaintiff himself is certainly not competent to give, and did not give in this case, any testimony in relation to the permanency of his injuries under such circumstances. We submit to the Court that to permit the jury to determine the issue of temporary or permanent damages where the evidence of permanent injury, if credible, is not to a reasonable certainty, denies the defendant his rights and due process of law the same as if the case is submitted to the jury where the evidence as a whole is not sufficient to sustain a verdict. And the admission of these tables and the instruction of the Court (Tr. 88), "They are introduced upon the theory that the evidence in the case has shown that the injuries were permanent" erroneously permitted the jury to believe that the evidence, if credible, could be considered proof of permanent injury to a reasonable certainty.

Leach v. Detroit Co., 84 N. W. 316.

Tenny v. Rapid City, 96 N. W. 96.

Texas and N. M. Ry. Co. v. Douglas, 7 S. W. 77.

City of Honey Grove v. Lamaster, 50 S. W. 1053.

Stevens v. N. J. R. R., 65 Atlantic 774.

Klein v. Phelps, 135 Pac. 226.

Also Authorities, Argument VIII.

In **Leach v. Detroit** mortality tables had been introduced and on appeal it was contended they were erroneously admitted because there was no evidence the injuries were permanent. The plaintiff contended that the testimony of his physician showed the injuries were permanent. The Court stated that under any fair interpretation of his testimony it falls short of showing permanent character of injury. The cases of Sax v. Detroit Co., and Mott v. Detroit Co., are cited as holding there was not evidence of permanent injury and the tables were erroneously admitted. The judgment reversed.

In **Tenny v. Rapid City** the Northwestern Tables were admitted over objection of defendant on the ground of no proof of permanency of personal injury. The Court states that there was no evidence that plaintiff was permanently injured and might not recover and the admission of the tables was erroneous and constituted prejudicial error.

In **Texas Mexico R. R. v. Douglas,** plaintiff had a permanent injury to his hand but the judgment was reversed because tables were admitted. The case shows the rule in Iowa and Texas to be that the tables are admissible when the evidence tends to show entire destruction of earning capacity, or when death results, but they are not admissible where the disability is only partial.

In the **Snyder** case, the Court at page 706 states:

"In the course of the trial the Court permitted the introduction of mortality tables to

show the expectancy of life of the plaintiff. It is argued by the defendant that this was error, because it was not shown that the plaintiff was permanently injured.. We think this position must be sustained. The most the evidence showed was that the plaintiff developed a neurasthenic condition after his injuries. He testified that since his injuries he has been required to walk with a cane, and with a limp or dragging of the foot. But we think there was no evidence of the fact that this dragging of the foot or limping was the result of the injuries which he received at the time of the accident. None of the doctors testified, so far as the record shows, that the natural and reasonably probable result of the injuries which the plaintiff received at the time of the accident would be a permanent injury. The Court therefore erred in receiving these mortality tables in evidence."

In **Stevens v. N. J. R. R.**, it was held that where the verdict is large and the trial has occurred so soon after a surgical operation that the physcians could not determine whether there would be complete or partial recovery. A new trial should be awarded.

ARGUMENT VI.

Specfications of Error VII., IX., X., and XIV.— Motion for Directed Verdict, Instructions on Hazardous Occupations.

The request for a directed verdict raises the question whether there is substantial evidence sufficient to sustain a verdict, and the denial of the motion subjects the evidence to review on error.

Under the Employer's Liability Law of Arizona the plaintiff is required to allege and sustain by evidence that he was employed by the defendant in an occupation declared to be hazardous and while engaged in the performance of the duties required of him was injured and the injury was caused by an accident due to a condition or conditions of such employment and was not caused by any negligence of the plaintiff. (C. & A. Co. v. Chambers, 20 Ariz. 54).

Plaintiff alleged that he was working at the time of the accident in a sample mill of the defendant but his proof failed to show this. He himself testified (Tr. 36) that he was working on concrete construction which was an addition and outside of the sample mill (Tr. 60), that was one of the buildings situated on the ground owned or controlled by the defendant. The plaintiff was not working in any building, either a smelter or a sample mill or any other kind. He was working on the outside where there was no power operated machinery, and no mechanical power. He was engaged not even in repair work, but upon ordinary concrete construction work in the course of construction of a new piece of work that was not being used and had not been used in connection with the operaton of any smelter or any other industry. The accident was not due to any condition, hazardous or otherwise, of a smelter, mill, plant, machinery, mechanical power or any other condition or thing due to a hazardous occupation or to any condition, avoidable or unavoidable, of employment in a hazardous occupation in mining, smelting or any other industry. The plaintiff stepped upon a board or plank which was

one of three placed across the aisle of concrete. The plaintiff knew the board was only two inches thick (Tr. 37); he knew that there were two other men on the plank when he stepped on it (Tr. 44). The evidence shows that the plaintiff had been working for several years on construction and other work of a nature where a reasonable and prudent man is supposed to have, or at least is expected to acquire, that amount of practical sense which will give him at least a reasonably due sense of proportion as to the strength of stagings which are temporarily used in construction work. The plaintiff had stepped with a heavy bolt upon a 2 in. by 12 in. plank placed across a ten-foot aisle, when he saw two other men each with a heavy bolt already standing on the plank. If it can be said that a man of this experience and under these circumstances exercised the care a reasonable and prudent person would exercise, especially when there were two other planks there upon which to step, then it would seem that the legal term or clause "care a reasonable and prudent person would exercise," means little or nothing in practical use. The Supreme Court of Arizona has recently held (C. & A. Co. vs. Gardner 21 Ariz. 206, 187 Pac. 563) that an employee who reached around a beam to turn off an electric switch and came in contact with electrical current, was negligent and no recovery could be had under the Employer's Liability Law. At page 215 the Court said, "Can it be said that a reasonable and prudent person, under the existing circumstances, would have done as he did? Or would not such a person have done as the evidence shows that the deceased had always done before, looked into the

face of the switch and aided his hand with his eye." In this case would not it have been the duty of a reasonable and prudent person to have kept off the plank when he knew and saw that there were two other men on it and when there were two other planks upon which to step? (United Verde Extension v. Koso.)

But even if the actions of the plaintiff were what a reasonable and prudent person would have done, how can the evidence be held to show that it was an "inherent" risk and hazard, unavoidable and due to a condition of the employment in a hazardous occupation. This accident was no more due to an inherent risk of a hazardous occupation "in mining smelting" or in some place where power driven machinery was used, than it would have been if the accident had occurred on the same kind of construction work situated miles away from any place where mining and smelting was carried on. The law does not state that the work of **constructing** a smelter or of **constructing** an instrumentality or building to be used directly or indirectly in connection with a smelter is ipso facto hazardous. It certainly is not the meaning of the law that all work on ground owned or controlled by an employer who is engaged in mining or smelting business is hazardous or that accidents which happen on such ground are ipso facto in hazardous occupations. The case of Arizona Eastern vs. Mathews and of New Cornelia Company vs. Esipnosa, 268 Federal 742 decided by this Court, show that the Court will construe the law as a whole to effectuate its apparent purpose to protect those employees who sustain injury while engaged in a hazardous occupa-

tion or occupations in mining and smelting and railroading and not to include all employees or all accidents which occur on the property on or in which mining, smelting and railroading is being conducted.

The lower Court based its instructions upon its interpretation of simply one clause of the law (Section 3156, Paragraph 8), overlooking the provisions of Section 3154 which state the very purpose of the law, quoting verbatim from the constitution, to "protect the safety of employees in all hazardous occupations in mining, smelting" and Section 3155 which explains the risks and hazards which are intended to be covered in the occupations enumerated in Section 3156, shows that inherent and unavoidable risks are contemplated; "by reason of the nature and conditions of, and the means used and provided for doing the work in said occupations, such services especially dangerous and hazardous to workmen therein, because of the risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein." The instructions of the Court (Specifications IX and X) do not state the law as it has been interpreted by this Court in the New Cornelia case. The only conclusion which the jury could draw from these instructions was that if the plaintiff was doing any kind of work around a mine or smelter (that is within the lines of the employer's ground) that was a hazardous occupation according to law and they had no right to find as a fact that work of some kinds around mines or smelters might be non-hazardous and might not be a hazardous occupation "in mining" as provided in Sec. 3154. To illustrate, we submit that these instructions, if they

were applied to the New Cornelia case, would have compelled the jury to find that the accident to the plaintiff therein was due to a hazardous employment because of the fact that it occurred within the lines of the defendant company. But this Court states at page 749 "the risk or hazard which the deceased incurred in being near the fire on the surface was not a risk or hazard inherent in the work in the mine, and in doing of that work the risk or hazard was avoidable by the deceased." Further, if it were assumed the instructions objected to were correct as general statements of law, there are no facts in evidence to support a finding by the jury that the plaintiff was in a hazardous occupation and that the accident was due to a condition inherent in a hazardous occupation in smelting, or in any other industry declared hazardous, or was due to a condition of employment in a hazardous occupation.

The defendant therefore submits that the evidence shows that the plaintiff was not engaged in a hazardous occupation in mining or smelting or where power was used, that the evidence shows he was at the time engaged in construction work on a building or work that was not completed and was not a part of any "works," "plant" or other mill, and that under the facts the plaintiff could have recovered if at all under the Employer's Liability Law only by bringing himself under the clause of the law set forth in Specification XIV, which his facts did not do, and the Court erred in refusing to give that instruction requested by defendant, and in giving the instructions quoted in Specifications IX and X.

Authorities cited under Argument II.

Crowell Bros. v. Panhandle Co., 271 Fed. 130:

Where there has been a motion for directed verdict the appellate court will review to determine whether there is substantial, or sufficient, evidence to sustain the verdict.

Milm v. Hussey, 155 N. Y. S. 860.

Conroy v. Inhabitants of Clinton (Mass) 33 N. E. 525:

This was an action for death while laying pipe at bottom of sewer by caving of walls. Verdict directed for defendant. Question on appeal was whether the case was within the clause of the statute reading "By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer." The Court cites Howe v. Finch which held that the statute did not apply to ways or works in process of construction. The plaintiff in the Howe case was injured by fall of the wall of a building in process of construction and which had never been used in defendant's business, though intended to be used. It was held that the case was not within the statute; J. Smith, after citing statute: "Does that mean partly made ways which may be very insecure when in process of construction?" "No, it means to give him a right of action when the contemplated works are connected with or used in the business." Ways means the ways used in the business, not partly made ways, not used. If this be so as to "ways" it is so as to works. I think that "ways, works" etc. mean the existing and completed works.

ARGUMENT VII.

Specification of Error VIII.—Argument on Value of Dollar

The objection to the argument on the present value of the dollar compared with past value seems to us against irrelevant and prejudicial statements. There was nothing whatever in the evidence upon which the jury could base such a comparison. The only possible basis would have been a verdict that had been allowed in the past, and this was not only not in evidence but could not properly have been admitted in evidence or brought into the argument. The jury would naturally form their estimate of a verdict in terms of the value of the dollar at the time of the trial. The only possible effect of the argument which generalized upon an unsworn statement, "that ten thousand dollars today is not worth as much as five thousand dollars was four or five years ago," was to encourage the jury to add a further sum, based upon conjecture and guess, to the amount which they would estimate according to the current value of the dollar in any event. The argument submitted on this matter permitted the jury to award an increased sum for which there was no evidence or basis, as a gratuitous and wholly unwarranted and unsupported addition to any damages they might otherwise have awarded.

Hurst v. C. B. & Q., 10 A. L. R. 174.

Union Pacific v. Field, 137 Fed. 18.

Waldron v. Waldron, 39 L. Ed. 452.

The following is a Note under the Hurst case:

> The following authorities are in substantial accord with the earlier decisions in supporting the general rule that in comparing present and past verdicts for similar personal injuries, the difference in the purchasing power of money, or as it is commonly called, the increase in the cost of living at the present time as compared with power at the time prior awards were made, may be taken into consideration.
>
> (This shows the application to a **comparison** between verdicts, in determining the question of excessive verdicts. The comparison is impossible when an argument is made to a jury as there are no facts or past verdicts in evidence.)
>
> In **Union Pacific v. Field,** the Court at page 15: "It is the duty of the court . . . to prevent the jury from the consideration of extraneous issues, of irrelevant evidence . . . and to assure the litigants a fair and impartial trial. . . . A trial is not fair and impartial in which a discussion of irrelevant issues, a statement of a persuasive but immaterial fact, or the assertion or insinuation of an erroneous view of the law or of the wrong measure of damages by counsel in his address to the jury, may have had an influence favorable to his client." At page 17 the Court quotes statement made to the jury by counsel "I say to you on my own behalf, however large a sum of money the $20,000 . . . may be, that would not compensate me." The Court said "he stated a fact which there was no evidence to prove, and which it would have been a fatal error to have admitted testimony to establish—the fact that

he would not be willing to receive an injury like that of plaintiff for $20,000."

"Counsel in their arguments are bound to keep within the limits of fair and temperate discussion. The range of that discussion is circumscribed by the evidence in the case. Any violation of this rule entitles the adverse party to an exception which is as potent to upset a verdict as any other error committed."

ARGUMENT VIII.

Specifications of Error XI. and XII.—Instructions on Permanent Injury

These specifications have reference to the question of evidence of permanent injury. The position has been stated in the Argument V. above. There must be evidence upon which the jury might find, if the evidence were credible, to a reasonable certainty, the permanence of the injury and disability complained of before the question of whether or not they are permanent can be submitted to the jury. The position of the lower court on this question was that the judge was not required to determine whether or not there was evidence of permanent injury or disability but that the jury was the sole judge of whether or not there was any such evidence and if there was any whether or not it was sufficient to sustain a verdict for permanent injury. The instruction given by the Court (Specification XI.) and refusal to give the requested instruction (Specification XII.) is er-

roneous for this reason, as well as because there was no evidence of permanent injury to warrant submission of the question to the jury or to sustain a verdict for permanent injury. Furthermore, there was absolutely no evidence that the plaintiff's earning capacity for the future had been either partially or permanently destroyed. That there must be evidence to support such allegations, when made, is indisputable law (W. U. Tel. Co. v. Morris, 83 Fed. 994); but in this case there was not even an allegation in the complaint of any future decreased earning capacity (Tr. 5). Yet, this instruction, without there being any allegation in the complaint or evidence in the case, directed the jury to determine whether or not there was permanent loss of earning capacity. The amount of the verdict in itself proves that the jury included an assumed loss of earning capacity, as they were authorized by the instructions to do, although there was no evidence whatsoever of even probability of any such loss.

White v. Milwaukee, 21 N. W. 524; 50 Am. Rep. 154.

Meeter v. Manhattan, 75 N. Y. S. 561.

Filer v. N. Y. C. 49 N. Y. 43.

Tweedy v. Inland Brewing Co., 134 Pac 468.

W. U. Tel. v. Morris (C. C. A. 8th), 83 Fed. 99.2

Snyder v. Great Northern, 152 Pac. 703.

Pollock v. Pollock, 71 N. Y. 140.

Strohm v. N. Y. Lake E. & W., 96 N. Y. 304.

Main v. Gr. Rapids R. R., 174 N. W. 157.

Ayres v. D. L. & W. 158 N. Y. 254.

U. S. C. I. P. v. Eastham, 237 Fed. 185.

Gifford v. Washington Water Power Co., (Wash) 148 Pac. 11.

McNeill v. Interurban Co., 92 N. Y. S. 767.

17 Corpus Juris, page 1035, Permanency and Future Consequences:

> "Testimony of a physician as to the probable effect of the injury is admissible, but it should show that such result is reasonably certain and not a mere liklihood."

In the **Gifford** case two physicians testified for plaintiff. In answer to a question one physician testified "A. I would probably expect paralysis, convulsion—or convulsions, or severe periodical pains in the head, and possibly— Q. Leave out the word 'possibly,' Doctor, I don't care about that. A. All right. Q. Just what in your opinion you would expect, quite possible? A. General nervousness." And on cross examination "Q. Yes, but you as a doctor would not say to this jury that it is your opinion that there ever will be an injury to the brain. A. Well, I could not say that in my opinion that there would not be either."

The Court at page 13 "It is apparent from the whole testimony of the doctors that neither of them intended to say that any serious results were reasonable certain to appear from this head injury. The rule is well settled by numerous decisions that future consequences which may presently be recovered for must be such consequences as

are reasonably certain to ensue. . . . We are satisfied that this is the correct rule (citing the Strohm case) and also that the conclusions of these two physicians were clearly speculative, and had reference only to possible consequences and not to consequences that are reasonably certain to accrue." It was held that the court erred in permitting the evidence to be considered by the jury. The judgment was reversed for this and another error.

In the **Strohm** case a physician testified that the injuries would very likely be permanent "I mean that the boy will always have some reminder of it, some remnants of this injury, great or small that is certain; how much he will retain I cannot tell, but I think it very likely he will retain." The Court at page 305 "Future consequences, which are reasonably to be expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury they must be such as in the ordinary course of nature are reasonably certain to ensue. . . It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury nor even that they are likely to so develop. To entitle a plaintiff to recover present damages, for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." Judgment was reversed.

In **Main v. Grand Rapids**, the complaint alleged permanent disfigurement and future

great bodily pain. Defendant claimed that the Court in its charge in effect authorized the jury to award damages for permanent injury of which there was no proof to a reasonable certainty. Charge was "if you find the nervous system impaired . . . you will consider how long such condition may continue as far as the evidence shows." The higher Court states "The instruction should be confined to such damages as are proximately shown by the evidence, with reasonable certainty, to result. Only such future damages are recoverable as the evidence makes reasonably certain will necessarily result from the injury."

In **White v. Milwaukee** the plaintiff introduced testimony that she had not recovered from the injury and it might be permanent. The Court states "A mere possible continuance of disability by reason of an injury is not a proper element of damages to justify a jury in assessing damages for future or permanent disability, it must appear by the proofs that continued or permanent disability are reasonably certain to result. "It is fair to assume that the jury predicated their assessment of damages in part upon the possibility of permanent injury. This is error." Judgment was reversed.

In the **Meeter** case plaintiff's physician was asked "Can you say with reasonable certainty whether this injury is likely to be permanent?" He replied "It is likely to be permanent in the sense that it will improve somewhat but she is not likely to ever get entirely over it." The lower court charged "If you consider she is permanently injured you may award compensation for that. When

I say 'if you consider' I mean if you consider from the evidence." The appellate court says "In view of what preceded it is evident that sufficient weight was not given to the true rule that should be applied in regard to giving damages for permanent personal injury in cases of this kind. In the reception of evidence and in the efforts made to exclude what was regarded by defendants as incompetent and in the charge of the court the effect was to some extent to permit the jury to understand that they were at liberty to award damages for injuries which were likely to be permanent, instead of confining their verdict to damages for such injuries as would with reasonable certainty be permanent."

In the **McNeill** case the Court reviewed the evidence and reversed the judgment because it submitted to the jury the question of perpermanency of the injury.

In the **Ayres** case the plaintiff's knee and spine were injured and she was wearing a brace at time of trial more than two years after. Her doctor testified that her condition would continue more or less as long as she lived. The testimony was given after asking the physician if he could state with reasonable certainty. The defendant requested an instruction that "upon the evidence there was no ground upon which the jury could find any future damages in reference to injury to the knee." This was refused. The Court at page 261 "There was no request to charge that the jury could not find any permanent damages, with reference to the knee, but simply that they could not find any future damages." Further, that the evidence showed that plaintiff would suffer

> more or less in the future owing to the condition of her knee which was not yet well, and while the future inconvenience might be slight and of short duration "the defendant was not entitled to have it altogether withdrawn from the consideration of the jury, or to the instruction "that the jury could not find future damages."

(The manifest inference is that if the defendant had asked an instruction that the jury could not find **permanent** damages it should have been given.)

> In the **Eastham** case the complaint alleged that injuries permantly rendered plaintiff less able to work; there was no evidence tending to show to what extent the disability would decrease earning power. The Court states that unless the jury's attention had been called to the fact it could not assess substantial damages for decreased earning capacity shown by the physician's testimony, "it might well be, and probably is a fact that the jury took this into consideration in arriving at the amount." "The jury is not allowed to invade the realm of supposition to arrive at the compensation to be awarded the plaintiff for this element of damages." New Trial ordered.

In conclusion we respectfully submit to this Court that each of the eight Arguments constitute error or errors on the part of the trial court, which were prejudicial to the rights of the defendant and were reversible error at law. The judgment of the

trial court should and ought to be reversed and its judgment ordered to be entered dismissing the cause.

Favour & Baker

Attorneys for Plaintiff in Error.

APPENDIX

Revised Statutes of Arizona, 1913

Sec. 3153. This chapter is and shall be declared to be an employer's liability law as prescribed in Section 7 of article XVIII of the state constitution.

Sec. 3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said section 7 of article XVIII of the state constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

Sec. 3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and haz-

ards which are inherent in such occupations and which are unavoidable by the workmen therein.

Sec. 3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

* * * * * * *

(5) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

(8) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

(10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

Sec. 3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by accident arising out of and in the course of such labor, service and employment ,and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured then the employer of such employee shall be liable in damages to the employee injured, or in case death ensues, to the personal representative of the deceased for the benefit of the surviving

widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and, if none, then to his personal representative, for the benefit of the estate of the deceased.

Sec. 3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in section 5 of article XVIII. of the state constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.